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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

R.R. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

M.U.,

Real Party in Interest.

G042528

(Super. Ct. No. DP011592)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Douglas Hatchimonji, Judge. Petition granted.

Law Office of Harold LaFlamme and Lawrence A. Aufill for
Petitioner R.R.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Petitioner Orange County Social Services Agency.

Leslie A. Barry, under appointment by the Court of Appeal, for Real Party in Interest Maile U.

* * *

Four-year-old R.R. petitions this court for relief from the order of the juvenile court refusing to terminate parental rights and free her for adoption. The juvenile court found termination would be detrimental to R.R. because of her relationships with her parents and siblings. R.R. claims these findings are not supported by substantial evidence. Her petition is joined by the Orange County Social Services Agency (SSA). We grant relief.

FACTS

R.R. was born in April 2005 with a positive toxicology screen for heroin. Her mother admitted to using heroin and had previously engaged in incidents of domestic violence. Her father also had a history of substance abuse and had a criminal record. A dependency petition was sustained, R.R. was removed from parental custody, and reunification services were offered to the parents.

After R.R. was released from the hospital, she was placed in an emergency shelter home, where she remained for close to two months. Then she was placed in the foster home of Keith and Tina S. She remained there until October 2006, a period of 16 months. During that time, she took phenobarbital for withdrawal symptoms and was “highly agitated and irritable.” She suffered from significant developmental delays and became a client of the Regional Center.

The mother participated in services and visited R.R. regularly. In July 2006, the mother gave birth to R.R.’s sister, Kayla. Subsequently, the mother left the father, and she and the baby moved in with a friend. In October 2006, R.R. was released

to the mother on a trial visit. The visit failed, however, in January 2007 when the father was found in the mother's home in violation of a court order. R.R. was placed back in the home of Keith and Tina S.

Six months later, in June 2007, R.R. returned to the mother's custody with family maintenance services. She remained there for more than one year. The mother gave birth to her third child, Lauren, in May 2008. In September 2008, all three children were removed from the mother because they were found living in the paternal grandmother's home, a known drug house, under filthy conditions. R.R. was again placed with Keith and Tina S.; her siblings were placed in a separate foster home.

The hearing on the supplemental petition was held on November 18, 2008. The juvenile court sustained the petition, ordered R.R. removed from parental custody, and terminated reunification services. It reduced visits to once a month. While the permanent plan selection hearing was pending, R.R. was removed from the home of Keith and Tina S due to her "aggressive behavior" and the foster mother's health issues. In May 2009, she was placed in the foster home of Shelly S. and Leonore L., who wanted to adopt her. The foster parents had a six-year-old daughter, to whom R.R. quickly became attached.

The permanent plan selection hearing began on May 19, 2009. Ruby Moore, R.R.'s social worker since January 2009, testified. She opined that R.R. was adoptable notwithstanding her speech and language delays because she is friendly, inquisitive, and engaging. Moore had not personally observed any visits between R.R. and her parents and siblings, but she acknowledged that the visitation monitors all reported the parents were "appropriate," "attentive," and "affectionate" when visiting, and that R.R. would "smile and laugh and run to the parents" when the visits began. She also acknowledged the reports that the siblings were "highly affectionate with each other and interacted well with one another." No one had reported to her that the reduction of

visits to once a month had adversely affected R.R.'s relationships with her parents or siblings.

Richard Punzalan was the regular visitation monitor for R.R. from October 2005 to May 2007; he monitored "probably two" visits after R.R. and her siblings were removed from the mother for the second time, in September 2008. Punzalan testified the mother was "calming when the child was crying; she was observant of her needs. She gave her physical affection. And she fed her, cleaned her, and spoke gently to her." R.R. responded positively to the mother's ministrations. She also interacted well with her sibling Kayla.

Kirstie Giner was the assigned social worker on R.R.'s case "right after she'd been removed from the [mother's] home [in the Fall of 2008]." Giner monitored more than ten two-hour visits between R.R. and her parents and siblings at SSA's offices between September 2008 and January 2009. Giner testified there was a bond between the parents and their children. "[T]he children clearly identified the parents as their mother and father. There was no confusion to that. . . . [T]hey were highly affectionate with them, very engaged with them, would talk with them, play with them. [¶] . . . It wasn't just the parents attempting to engage the children; the children were engaging their parents as well." Giner also opined "there is a very strong bond . . . between Kayla and [R.R.]" Despite the bonds she observed, Giner recommended in her October 2008 report that R.R.'s case move to a permanent plan selection hearing.

On June 8, 2009, the juvenile court found R.R. was adoptable but stated its intention not to terminate parental rights "because the court finds by preponderance of the evidence that termination would be detrimental to the child under the . . . beneficial relationship and sibling relationship exceptions." The court found the parents had regularly and consistently visited R.R. over the course of the dependency. It then discussed "whether there exists a parental relationship that is a significant positive

emotional parental relationship as between [R.R.] and her parents. This analysis must also keep in mind and balance the strong legislative preference for adoption and the high standard that this preference sets.” The court acknowledged that “return of the child to the parents is not an option,” and that its focus must be whether the “termination of parental rights would be detrimental to the child.”

The court found “the compelling reason . . . not to terminate parental rights” was the applicability of both the beneficial relationship and the sibling relationship exceptions, “which in this case adds up to a significant and positive emotional family relationship as between [R.R.] and the rest of her family. [¶] In other words, this court doesn’t believe it’s appropriate to pitch and hold the evidence bearing upon the beneficial relationship on the one hand, and the sibling relationship on the other. The court looked at the whole picture in considering the detriment to the child by terminating parental rights.”

The court found a positive parental relationship existed between R.R. and her parents as evidenced by the consistently positive visits, the spontaneous displays of affection, the nurturing roles taken by the mother and father, and the strong bond observed by multiple visitation monitors. It also found R.R. and her sister Kayla shared a sibling bond based on the facts that they lived together from June 2007 to September 2008, and the visitation monitor and the social worker testified they were very close. The court found R.R. would be harmed if the sibling bond was severed. It concluded, “The court believes that the whole picture painted by the evidence gives rise to the inference that terminating parental rights in this case and severing her connection with her family will greatly harm [R.R.]” The court then stated it did not have sufficient information to choose between legal guardianship and long-term foster care, so it continued the hearing and ordered SSA to provide more information about a permanent plan.

The hearing continued on August 24. The court refused to consider SSA reports filed since June 8 on the issues of adoptability or the exceptions “because the court already made factual findings on the record on June the 8th” The court selected long-term foster care as R.R.’s permanent plan.

DISCUSSION

R.R. and SSA contend there is insufficient evidence to support either the benefit exception or the sibling relationship exception. We agree.

At a permanent plan selection hearing, the juvenile court will ordinarily terminate parental rights if it finds by clear and convincing evidence that a child is adoptable. The termination of parental rights to an adoptable child can be avoided, however, if the court finds “a compelling reason for determining that termination would be detrimental to the child” due to at least one of several statutorily-described circumstances. (Welf. & Inst. Code, § 366.26, subds. (c)(1)(B)(i)-(iv).)¹

The so-called beneficial relationship exception describes circumstances where “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The sibling relationship exception describes circumstances where “[t]here would be substantial interference with a child’s sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest, as compared to the benefit of legal permanence through adoption.” (§ 366.26, subd. (c)(1)(B)(v).)

¹ All statutory references are to the Welfare and Institutions Code.

If the court finds that one of the exceptions applies, “it shall state its reasons in writing or on the record.” (§ 366.26, subd. (c)(1)(B).) The court here clearly found termination of parental rights would be detrimental to R.R. due to the cumulative harm of severing both her parental relationship and her sibling relationship. It did not find either exception alone met the statutory requirements. This was error. Nowhere in section 366.26 or in the dependency statutory scheme is it suggested that partial satisfaction of two different exceptions would justify a plan other than the legislatively preferred plan of adoption. (See *In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164-1165 [clear legislative intent to create only the five exceptions listed under subdivision (c)(1)(B)].) When the Legislature added the sibling relationship exception in 2001, it did not add language indicating the exceptions could be considered cumulatively, and such a construction does not comport with the strong preference for adoption.

When we consider each exception individually, we find insufficient evidence to support either one. Both exceptions involve a balancing test, with the juvenile court weighing the strength of the relationship on one hand and the benefit of permanency and stability through adoption on the other. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 424.) To outweigh the benefit to a four-year-old girl of a future in a secure and stable home, the relationship justifying the exception must be so significant that its severance would have a profound and lasting effect on the child.

Neither the parental nor the sibling relationship here passes muster. The parents had failed to reunify with R.R. after 35 months of services, and the juvenile court acknowledged that placement with them was not an option. She enjoyed her visits with them, but there is no evidence she suffered from their absence between visits. Likewise, her relationship with her siblings is minimal. She has lived half her life without her sisters, and the time she and Kayla lived together was when R.R. was two and three years old.

We recognize that R.R. may experience sadness and a sense of loss if she is unable to see her family again. But this does not equate to the kind of detriment envisioned by the statutory exceptions. (Contra, *In re S.B.* (2008) 164 Cal.App.4th 289.) We can find no substantial evidence to support the juvenile court's order; thus, we must reverse it.

DISPOSITION

Let a writ of mandate issue directing the juvenile court to vacate its order applying the statutory exceptions and refusing to terminate parental rights and enter a new order terminating parental rights.

SILLS, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.